Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	EB Docket No. 07-197
	)	
Kurtis J. Kintzel, Keanan Kintzel, and all	)	File No. EB-06-IH-5037
Entities by which they do business before the	)	
Federal Communications Commission	)	FRN: 0007179054
	)	
Resellers of Telecommunications Services	)	NAL/Acct. No. 200732080029

To: Richard L. Sippel
Chief Administrative Law Judge

ENFORCEMENT BUREAU'S OPPOSITION TO MOTION OF THE KINTZELS, ET AL., TO MODIFY THE ISSUES, OR, IN THE ALTERNATIVE, STATEMENT OF OBJECTIONS TO THE ORDER TO SHOW CAUSE

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INTRODUCTION

1. On November 16, 2007, Kurtis J. Kintzel, Keanan Kintzel, and all entities by which they do business (collectively, the "Kintzels"), filed a pleading entitled, "Motion of the Kintzels, et. al., to Modify the Issues, or, in the Alternative, Statement of Objections to the Order to Show Cause" ("Motion").[1] The Enforcement Bureau hereby requests that the Presiding Judge dismiss the Motion as procedurally defective or deny the Motion on the merits. In support whereof, the following is shown.

2. The Motion advances a hodgepodge of arguments which, collectively, are apparently intended to impede the course of this hearing proceeding. Although the Motion is styled as a request to modify the issues and objections to the Order to Show Cause, a careful reading of the pleading reveals that it may be more appropriately characterized as a premature motion for summary decision of various issues or an impermissible petition for reconsideration of the Order to Show Cause. As shown below, the relief sought should be rejected.

ARGUMENT

I. The Motion is an Unjustified Request for Deletion or Premature Request for Summary Decision of an Issue

3. While nominally styled as a motion to modify the issues in the Order to Show Cause, at least one portion of the Motion is more properly viewed as a motion for deletion under Section 1.229[2] or summary decision under Section 1.251[3] of the Commission's rules. As explained more

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[1] The Motion was originally filed on October 26, 2007. However, because it was improperly directed to the Commission, the Presiding Judge ordered the Kintzels to file a consent motion to withdraw the Motion and file a correctly captioned first page. The Kintzels filed their "Consent Motion to Withdraw the 'Motion to Modify Issues' from the Commission Docket" on November 16, 2007.

[2] 47 C.F.R. § 1.229.

[3] 47 C.F.R. § 1.251.

fully below, deletion and summary decision of any issue in this proceeding at this time is entirely unjustified and/or premature.

4. In Section VI of the Motion, the Kintzels seek to have the Presiding Judge delete from the Order to Show Cause the issue pertaining to the alleged discontinuance of service.[4] However, in considering a motion to delete issues from a hearing designation order, the Presiding Judge must determine "whether specific reasons are stated for [Commission] action or inaction ... rather than merely considering whether the petitioner relies on new facts or whether [the Commission was] aware of the general matter upon which [the presiding offer] relies."[5]

5. The Commission explained its reasons for including the issues relating to discontinuance of service in the Order to Show Cause,[6] noting "Kintzel also conceded [in the response to the Bureau's letter of inquiry] that Buzz and BOI had discontinued service to all customers in each state where they had been providing services despite having failed to request and obtain Commission authorization to do so."[7] Because the Commission gave a reasoned analysis for inclusion of these issues in the Order to Show Cause, the Presiding Judge may not delete those issues.[8]

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[4] The Motion states that it is seeking to have the discontinuance of service "allegations" deleted. *See* Motion at 15. However, motions under Section 1.229 may only seek modification of issues. If the relief sought is deletion of the issues relating to the alleged discontinuance of service, those issues are contained in paragraph 24(a) and (e) of the Order to Show Cause.

[5] *Applications of Atlantic Broadcasting Co., et al.*, Memorandum Opinion and Order, 5 FCC2d 717, ¶ 10 (1966) ("*Atlantic Broadcasting*").

[6] *See* Order to Show Cause at 3, 4-5, ¶¶ 6, 8, 11.

[7] Order to Show Cause at 4, ¶ 8. Thus, the Commission was clearly aware of the January 17, 2007 response to the Bureau's letter of inquiry ("LOI Response"). That response specifically discussed, among other things, the fact that BOI and Buzz were resellers of Qwest long distance services, as well as BOI and Buzz's contention that Qwest was responsible for the discontinuance of service. A copy of the LOI Response is attached hereto as Exhibit 1.

[8] The request for deletion also is inappropriate because it does not meet the requirements of Section 1.229(d), which provides that motions to enlarge, change or delete issues "shall contain

6. Furthermore, the relief requested in Section VI of the Motion, with respect to the discontinuance of service allegations in the Order to Show Cause, is in the nature of a motion for summary decision rather than a motion to delete because it implicitly argues that there are no genuine issues of material fact and that the Kintzels are entitled to judgment as a matter of law.

7. In order for the moving party to be entitled to summary decision, it bears the burden of showing: (1) the absence of genuine issues of material fact; and (2) that it is entitled to judgment as a matter of law.[9] Summary decision is an extraordinary remedy that should only be granted "where the parties are in agreement regarding the factual inferences that may be properly drawn from the record."[10] As the moving party, the Kintzels bear the burden of establishing, based on their papers, that summary decision would be appropriate.[11] Mere allegations are

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specific allegations of fact sufficient to support the action requested." 47 C.F.R. § 1.229(d). Those factual allegations must be supported by affidavits made on personal knowledge. *Id.* While the Motion contains a multitude of factual allegations, it fails to support those allegations with an affidavit made on personal knowledge. Rather, the Motion is supported by the Affidavit of Kurtis J. Kintzel, sworn on October 26, 2007 (the "Kintzel Affidavit"), attached as Exhibit A to the Motion. This one-paragraph affidavit states in its entirety that Mr. Kintzel has read the motion "and that the facts stated therein are true and correct to the best of my knowledge, information, and belief." It is impossible to tell from the Kintzel Affidavit which facts are based on Mr. Kintzel's personal knowledge and which are based on information and belief. Thus, the Kintzel Affidavit cannot be viewed as an affidavit made on personal knowledge sufficient to support a motion to enlarge, change or delete issues. For this reason, as well as for the reasons set forth in detail below, the Motion must be denied.

[9] 47 C.F.R. § 1.251(a)(1). *See also Matter of Family Broadcasting, Inc.*, Order to Show Cause, 17 FCC Rcd 6180, 6188 ¶ 27 (2002) ("*Family Broadcasting*"); *Applications of Martha J. Huber, et al.*, Summary Decision, 9 FCC Rcd 85, 86, ¶ 14 (A.L.J. Richard L. Sippel 1993) ("*Huber*").

[10] *Family Broadcasting, Inc.*, 17 FCC Rcd at 6188 ¶ 27.

[11] 47 C.F.R. § 1.251(a)(1). *See also Matter of Summary Decision Procedures*, Report and Order, 34 FCC2d 485, ¶6 (1972) ("*Summary Decision Procedures*"), quoting Ernest Gellhorn, "Summary Judgment in Agency Adjudication," at 30 (April 1, 1970) ("The party moving for summary decision has the burden of establishing through a written record that no triable issue exists; and he has this burden even with respect to issues upon which the opposing party would have the burden at the hearing."); *Huber*, 9 FCC Rcd at ¶14.

insufficient to meet that burden.[12] The Motion fails to meet these stringent requirements. Moreover, the Bureau has not yet had discovery that would enable it to dispute the purported facts asserted by the Kintzels in support of the Motion.

8. The Motion sets forth numerous factual allegations in support of the requested relief.[13] However, it cites to no admissible evidence in support of those facts, nor does it attach any supporting documents, with the potential exception of the Kintzel Affidavit and a letter from Qwest to a Leslie Anderson at an unidentified entity.[14]

9. The Kintzel Affidavit cannot support the relief requested because it states only that "the facts stated [in the Motion] are true and correct to the best of my knowledge, information, and belief."[15] A generalized affidavit on information and belief is insufficient to support a motion for summary decision. Rather, the affidavit must be made on personal knowledge and must "set forth such facts as would be admissible in evidence, and ... show affirmatively that the affiant is competent to testify to the matters stated therein."[16] The Kintzel Affidavit does not attempt to parse out which facts in the Motion Mr. Kintzel affies to on personal knowledge and which he affies to on information and belief. Nor does the Affidavit demonstrate that Mr. Kintzel is competent to testify to any of the facts that seemingly are incorporated by reference into the Affidavit.

10. Moreover, there is no affiant testifying as to the authenticity of the letter from Qwest, describing the circumstances under which it was written or how it was maintained, or

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[12] 47 C.F.R. § 1.251(a)(1). *See also Huber*, 9 FCC Rcd at ¶ 14.

[13] *See* Motion at 6-9, 14-15, 17.

[14] *See* Exhibits A and B to Motion.

[15] Exhibit A.

[16] 47 C.F.R. § 1.251(c).

describing who Leslie Anderson is.[17] Under these conditions, the Presiding Judge cannot conclude that there are no genuine issues of material fact, nor that the Kintzels are entitled to judgment as a matter of law. Because the Kintzels have not met their burden under Section 1.251, the Motion must be denied.

11. Even had the Motion met Section 1.251's requirements, which it has not, summary decision is premature and would be inappropriate at this stage of the proceedings. The Bureau has not yet had the opportunity to seek discovery and thus is not yet in a position to rebut the numerous factual allegations in the Motion. For instance, the Bureau has had no opportunity to cross-examine Kurtis Kintzel and Leslie Anderson. The Bureau is entitled and must be permitted to pursue discovery prior to adjudication of the issues on the merits.

II. The Motion is an Unjustified Request for Modification or Inappropriate Petition for Reconsideration

12. As noted in paragraph 3, *supra*, the Motion is nominally styled as a motion to modify the issues in the Order to Show Cause. However, various portions of the Motion are more properly viewed as a motion for modification under Section 1.229[18] or as a petition for reconsideration under Section 1.106(a)(1)[19] of the Commission's rules. As explained more fully below, modification at this time is entirely unjustified and/or premature, and the Presiding Judge may not consider a petition for reconsideration.

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[17] Exhibit B to the Motion is cited only in support of the relief sought in Section VI of the Motion (discontinuance of service allegations).

[18] 47 C.F.R. § 1.229.

[19] 47 C.F.R. § 1.251.

13. Section III of the Motion seeks to have the Presiding Judge reduce the amounts of the proposed forfeitures in the Order to Show Cause.[20] Section IV of the Motion argues that the inclusion in the Order to Show Cause of violations of the consent decree between the Commission and various entities controlled by Kurtis and Keanan Kintzel dated on or about February 13, 2004 in connection with a proceeding under EB Docket No. 03-85 (the "Consent Decree") and violations of Commission rules that arise out of the same behavior violate the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution.[21] Section V of the Motion seeks a separate hearing of the Consent Decree violations pursuant to Section 1.95 of the Commission's rules.[22] Finally, Section VII of the Motion seeks to have the Presiding Judge delete from the Order to Show Cause the proposed individual liability against Kurtis and Keanan Kintzel (the "Kintzel Brothers").[23] Sections III, IV, V and VII of the Motion are not appropriate motions for modification, and the Presiding Judge should not grant the modifications sought by the Motion.

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[20] *See* Motion at 4-9. The requested modification does not pertain to any of the issues set for determination. Rather, it pertains solely to the amounts of the proposed forfeitures.

[21] *See id.* at 9-12. The Motion does not actually seek any specific relief in Section IV. Rather, it simply states that the "intent to impose additional punishment" for both Consent Decree violations and violations of Commission rules arising out of the same behavior "is barred by the Double Jeopardy Clause of the U.S. Constitution." Motion at 12. Moreover, the Motion asserts that the purportedly offending issues include subparagraphs (a) through (i) of paragraph 24 of the Order to Show Cause. *See* Motion at 11. However, subparagraph (d), alleging violation of Paragraph 15 of the Consent Decree by failing to make required voluntary contributions in a timely manner, does not have a corresponding allegation for violation of a Commission rule. Moreover, subparagraphs (h) and (i), alleging violations of the Commission's rules by failing to respond fully and completely to one or more Commission inquiries and by engaging in slamming, have no corresponding allegations for violation of the Consent Decree. Thus, subparagraphs (d), (h) and (i) are not properly included in this portion of the Motion.

[22] *See* Motion at 12-14. Presumably, this implicates each of the issues set for determination in the Order to Show Cause.

14. The requests are not based on any argument that the Commission failed to thoroughly consider these very matters when it adopted the Order to Show Cause,[24] nor could they be.[25] First, with respect to Section II of the Motion, the Order to Show Cause contains a lengthy discussion of the history underlying the instant proceeding, including a discussion of the earlier proceeding that led to the Consent Decree,[26] demonstrating a reasoned analysis of this matter by the Commission. Moreover, seeking reduction of the proposed forfeiture amounts in the Order to Show Cause is premature not only because the Bureau should be permitted to engage in discovery, but also because the proposed forfeiture amounts are just that – ***proposed amounts***. Indeed, in paragraphs 31-33, the proposed forfeiture amounts are all prefaced by the phrase "in an amount not to exceed." Until such time as the Presiding Judge determines that the Kintzels are liable for the alleged violations and issues an ordering setting forth the forfeiture amounts for which the Kintzels are liable, any ruling regarding the constitutional propriety of the proposed forfeiture amounts would be advisory in nature. Such a ruling would be inappropriate.

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[23] *See id.* at 16-18. As with the relief sought in Section V of the Motion, the relief requested in Section VII of the Motion presumably implicates each of the issues set for determination in the Order to Show Cause, as they each include proposed liability against the Kintzel Brothers.

[24] *See, e.g., Atlantic Broadcasting, supra*, ¶ 5.

[25] The only possible exception is the argument in Section III of the Motion requesting reduction of the proposed forfeiture amounts. That portion of the Motion contains a recitation of various facts of which the Kintzels believe the Commission was unaware. *See* Motion at 6-9. However, a motion under Section 1.229 must be accompanied by an affidavit setting forth facts supporting the requested action, which facts must be based on the affiant's personal knowledge. As discussed in note 7, *supra*, the Kintzel Affidavit does not state which facts in the Motion are based on Mr. Kintzel's knowledge and which are based solely on information and belief. Such an affidavit cannot be sufficient to support modification of a Commission action.

[26] *See* Order to Show Cause, at 1-3, ¶¶ 2-5. Section 1.80(b)(4) clearly states that in determining the amount of a forfeiture penalty, the Commission is to take into consideration "the nature, circumstances, extent and gravity of the violations and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 C.F.R. § 1.80(b)(4).

15. Second, as to Section IV of the Motion, the Order to Show Cause considered the distinction between violations of the Consent Decree and violations of Commission rules.[27] Indeed, the Order to Show Cause specifically addresses the fact that "violations of a consent order represent a serious breach of the Commission's rules that must be deterred."[28]

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[27] *See* Order to Show Cause, at 4-6, ¶¶ 9-14.

[28] *See id.* at 4, ¶ 9. Regardless, the issues set for determination in the Order do not violate the Double Jeopardy Clause. First, the penalties for the alleged offenses at issue are legislatively authorized. *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1982). Congress expressly provided for the imposition of forfeitures against a party for each separate violation of a Commission rule or order. Section 503(b)(1) of the Communications Act of 1934, as amended (the "Act") provides that a person "shall be liable to the United States for a forfeiture penalty" for the willful or repeated failure "to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act. . . ." 47 U.S.C. § 503(b)(1)(B). Section 503(b)(2)(B) of the Act provides for forfeiture penalties of "$100,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for ***any single act or failure to act*** described in paragraph (1) of this subsection." 47 U.S.C. § 503(b)(2)(B) (emphasis supplied). (As discussed in paragraph 22, *infra*, the amounts provided for in Section 503(b)(2)(B) have been increased to $130,000 and $1,325,000, respectively.)

Violation of a consent decree constitutes violation of a Commission rule and, in the instant case, violation of a Commission order. Under its express terms, the alleged violations of the Consent Decree constitute alleged violations of a Commission order for which the Commission is entitled "to exercise any rights and remedies attendant to the enforcement of a Commission order." Consent Decree at 10, ¶ 23. A true and correct copy of the Consent Decree, along with the Adopting Order, is attached as Exhibit 2 hereto. Section 1.95 of the Commission's rules provides that a party to a consent order may be subject "to any further sanctions for violation noted as agreed upon in the consent order." 47 C.F.R. § 1.95. The alleged violations of the Consent Decree are distinct from the alleged violations of Sections 63.71, 54.706 and 64.604(c)(5)(iii)(A) of the Commission's rules, 47 C.F.R. §§ 63.71, 54.706 and 64.604(c)(5)(iii)(A), set for determination by the Order. Each of the separate alleged rule and order violations is subject to the forfeiture penalties provided for in Section 503(b)(2)(B) of the Act. Thus, where, as here, penalties may be imposed "for any single act or failure to act," the penalties sought for violation of both the Consent Decree and violation of a Commission rule do not violate the Double Jeopardy Clause.

The Motion's Double Jeopardy argument also fails because the Consent Decree violations require proof of a fact that violation of other Commission rules does not. The Order specifies for determination whether the Kintzels, among other things, willfully or repeatedly violated the Consent Decree based on discontinuance of service with first notifying the Commission or the appropriate state regulatory authority, failure to make universal service contributions and failure to make TRS contributions. *See* Order to Show Cause, ¶ 24(a)-(c). It

16. Third, with respect to Section V of the Motion, the Commission gave thorough consideration to the provisions of Section 1.95, finding that waiver of that section would promote administrative efficiency and would serve the public interest:

> Where, in addition to possible consent order violations, there are also alleged violations of Commission rules that arise out of the same misconduct, relate closely to the alleged violations of a consent order, and collectively raise very serious questions about the fundamental qualifications of the entities in question, it is administratively efficient and would serve the public interest to consider such issues in a consolidated proceeding. We therefore waive Section 1.95 to the extent that it would otherwise restrict the scope of this proceeding to allow a comprehensive inquiry into all of the apparent violations referenced above committed by the Kintzel brothers.[29]

Because the Order to Show Cause contains a reasoned analysis of the Commission's decision to waive Section 1.95's requirement of a separate hearing for violations of consent orders,[30] thereby establishing good cause for the waiver,[31] the Presiding Judge may not modify the Order to Show Cause to set the alleged Consent Decree violations for a hearing separate from the alleged violations of Commission rules.

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further specifies for determination whether the Kintzels willfully or repeatedly violated Sections 63.71, 54.706 and 64.604(c)(5)(iii)(A) of the Commission's rules by those same actions or inactions. *See* Order to Show Cause, ¶ 24(e)-(g). While it is tempting to say that there is a complete identity between the alleged Consent Decree violations and the alleged rule violations, there in fact is not. At least three facts are necessary to prove the Consent Decree violations that are not needed to prove the violations of Sections 63.71, 54.706 and 64.604(c)(5)(iii)(A) of the Commission's rules: (1) the existence of the Consent Decree; (2) the identity of the parties bound by the Consent Decree; and (3) the types of behavior prohibited by the Consent Decree. Thus, the Consent Decree violations are distinct from the violations of Sections 63.71, 54.706 and 64.604(c)(5)(iii)(A) of the Commission's rules, and the Double Jeopardy Clause is not implicated.

[29] Order to Show Cause at 9, ¶23.

[30] *Atlantic Broadcasting, supra,* at ¶ 10.

[31] 47 C.F.R. § 1.3. *See also Applications of State of New Hampshire and McCormick & Jacobson,* Memorandum Opinion and Order, 14 FCC Rcd 3607, 3613 ¶ 12 (WTB 1999).

17. Finally, as to Section VII of the Motion, the Commission thoroughly considered the inclusion of the Kintzel Brothers as parties in this proceeding from whom forfeiture and license revocation is sought. For example, the Commission took into consideration the Kintzel Brothers' ownership and control of the various entities covered by the Order to Show Cause.[32] Moreover, the Commission repeatedly refers to the Kintzel Brothers in addition to the entities they control throughout the Order to Show Cause.[33]

18. Because Sections III, IV, V and VII are not appropriate motions for modification of issues in the Order to Show Cause,[34] they are more properly viewed as petitions for reconsideration of the Order to Show Cause. However, petitions for reconsideration are outside the purview of the Presiding Judge's authority. Rather, such petitions "will be acted on by the Commission."[35] Thus, the Presiding Judge may not consider these portions of the Motion.

19. Even if the Presiding Judge could entertain a petition for reconsideration, the Motion as such is without merit. By its terms, Section 1.106(a)(1) provides that the Commission will entertain a petition for reconsideration of an order designating a case for hearing "if, and insofar as, the petition relates to an adverse ruling with respect to the petitioner's participation in the proceeding."[36] The only portion of the Motion that addresses the status of a party is Section VII, which seeks to delete the proposed individual liability of the Kintzel Brothers. However,

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[32] *See id.* at 1, 3-9, ¶¶ 2, 5, 6, 8, 10-15, 17, 19-22.

[33] *See id.* at 1, 3, ¶¶ 2, 5, 6.

[34] This is especially true with respect to Sections III and VII of the Motion. Section III seeks reduction of the proposed forfeiture amounts. Section VII of the Motion seeks to removed the proposed liability of parties to this proceeding. These are not "issues" set for determination, and thus do not constitute the types of modifications contemplated by Section 1.229. 47 C.F.R. § 1.229(a).

[35] 47 C.F.R. § 1.106(a)(1).

[36] *Id.*

because the Kintzel Brothers are named as parties to this proceeding, there has been no adverse ruling with respect to the Kintzel Brothers' right to a hearing.[37] Thus, reconsideration is unavailable.

III. Modification of the Order to Show Cause to Include a More Definite Statement is Unavailable and Unjustified

20. Section II of the Motion seeks a "more definite statement" regarding the number and instances of violations so that the Kintzels may "assess whether the Commission's proposed penalties are authorized under Section 503 or exceed statutory limits."[38] Section 1.229 applies only to motions seeking to enlarge, delete or modify issues.[39] Section II does not seek modification of an issue. Regardless, the Presiding Judge should deny the requested relief because the Order to Show Cause contains sufficient particularity regarding the calculation of the proposed forfeiture amounts, including citation to supporting authority.

21. According to the Motion, the Order to Show Cause states only "in very general terms the allegations" supporting the proposed forfeitures and "offers no detail on the number of instances that would justify such astounding penalties."[40] In support of this assertion, the Motion refers to paragraphs 31-33 of the Order to Show Cause.[41] However, the Motion fails to bring to the Presiding Judge's attention paragraphs 18-21 of the Order to Show Cause, which set forth the exact detail sought by the Motion. For example, paragraph 20 states:

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[37] *See, e.g., Family Broadcasting, Inc.*, Order to Show Cause, 16 FCC Rcd 12801, 12803 ¶ 6 (2001); *Applications of Seattle Public Schools*, Memorandum Opinion and Order, 60 Rad. Reg. 2d 1073, ¶ 6 (1986); *Matter of RCA American Communications, Inc.*, Memorandum Opinion and Order, 69 FCC2d 426, ¶ 4 (1978).

[38] Motion at 3.

[39] *See* note 33, *supra*.

[40] Motion at 3.

[41] *Id.*

> Issues are specified below to determine whether the Kintzel brothers engaged in conduct that violates paragraph 15 of the Consent Order. Each violation of this paragraph carries a potential forfeiture of $130,000 per violation or each day of a continuing violation except that the amount assessed for any continuing violation shall not exceed $1,325,000 for any single act or failure to act. The Kintzel brothers apparently failed to remit 12 consecutive monthly voluntary contributions required under paragraph 15. These apparent violations each represent a separate continuing violation, and it therefore shall be determined whether the Kintzel brothers are subject to a forfeiture in an amount not to exceed $15,900,000.

Because the Order to Show Cause contains sufficient particularity regarding the "number of instances" supporting the proposed forfeiture amounts, a more definite statement is unnecessary.

22. The Motion further seeks a specific statement regarding "the authority upon which the imposition of fines is based, for each alleged violation."[42] This request appears to be based upon the mistaken belief that the Order to Show Cause proposes penalties in excess of the statutory limits set by Section 503 of the Act.[43] However, the Motion fails to take into account Section 1.80(b) of the Commission's rules, which provides that the maximum forfeiture allowed against a common carrier is "$130,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,325,000 for any single act or failure to act described in paragraph (a) of this section."[44] The Order to Show Cause expressly cites to Section 1.80(b).[45] It also cites to Section 1.95 of the

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[42] *Id.*

[43] *See id.*

[44] 47 C.F.R. § 1.80(b). Pursuant to the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461, which requires federal agencies to adjust maximum statutory civil monetary penalties at least once every four years, Section 1.80(b) was amended in 2004 to increase the maximum available forfeiture amounts. *See Amendment of Section 1.80(b) of the Commission's Rules,* Order, 19 FCC Rcd 10945 (2004).

[45] *See* Order to Show Cause at 8, n. 37.

Commission's rules[46] in support of the proposed forfeiture relating to the amounts for which the Kintzels could have been liable under the Order to Show Cause that initiated the original hearing that led to the Consent Decree at issue in the instant proceeding.[47] Additional particularity is unnecessary.[48]

CONCLUSION

23. For the foregoing reasons, the Bureau respectfully requests that the Presiding Judge deny the Kintzels' Motion to Modify the Issues, or, in the Alternative, Statement of Objections to the Order to Show Cause.

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[46] 47 C.F.R. § 1.95.

[47] Order to Show Cause at 7, ¶ 17.

[48] Even if the Order to Show Cause did not contain the specificity sought by the Motion regarding the number of instances of violations by the Kintzels, modification of the Order to Show Cause to include such additional information is unnecessary. The Kintzels are free to avail themselves of permissible discovery under the Commission's rules. Such discovery would provide the Kintzels with the relevant details and facts they need regarding the issues set for determination.

Respectfully submitted,
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December 4, 2007

EXHIBIT 1

January 17, 2007

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Dear Mr. Hendricks,

Per our telephone conversation, you extended our response date to January 20, 2007. This response is emailed today, January 17, 2007, with an original being mailed first class.

Below are my responses to your inquiries from your December 20, 2006 letter. Neither Business Options, Inc. nor Buzz Telecom, Corporation is in business and generating income that could pay for legal representation. Without legal council, I have responded to the best of my ability.

Inquiry #1

Business Options, Inc. and Buzz Telecom, Corporation (collectively hereafter known as "BOS") resold Qwest long distance services, primarily to residential customers. I received a notice via email on November 11, 2006 stating that the Qwest November invoice could now be viewed on-line. The actual invoice came several days later. Per the BOS contract with Qwest, the payment terms were net 10, thus the due date should have been November 21. On November 20th, Qwest sent another email late in the day giving a one day notice for payment or accounts would be suspended the following day.

To my knowledge, we had never even been thirty days late and we needed about a week as our billing was sent out late. I attempted to resolve the situation with Qwest, but to no avail. Qwest shut off nearly 28,000 BOS customers over the next 7 days.

So to generally answer your inquiry #1, BOS did discontinue service to its customers as a result of the psychotic actions by Qwest. 28,000 customers lost their long distance service and BOS was out of business within 17 days from the date the invoice was made available on-line. I'm sure this has never been done in the history of telecom, let alone any other business sector. We did discontinue service to every customer in every state we were providing services to; however, we did not do so intentionally and did not want to go out of business.

After the customers were shut off and Qwest customer service telephone lines lit up, Qwest proceeded to have another of their resellers contact BOS to get the disconnected customers some immediate help. Qwest proceeded to turn the customers service back on, but not under the BOS reseller account. I conveyed the company trade names and toll free number to the other Qwest reseller who began servicing the previous BOS customers. Additionally, there is another Buzz Telecom out of Canada.

If you see the name Business Options or Buzz Telecom arise from any sales call, service issue, or billing situation after November 2006, please know that it is not affiliated with me, Business Options, Inc. an Illinois corporation or Buzz Telecom, Corporation a Nevada corporation. BOS has not marketed to new customers since September 2006 or serviced or billed any customers since November 2006.

1a) Buzz Telecom, Corporation and Business Options, Inc. have both discontinued providing long distance service.

1b) The states in which BOS had no customers are: Alaska, Arizona, Connecticut, Hawaii, Maine, Utah, and Vermont. BOS had customers in every other state.

1c) BOS service was discontinued between November 18th and November 30th, 2006 to all existing customers.

1d) Because BOS had no intention of discontinuing long distance service to its customers, BOS had not requested authorization to discontinue service from the FCC or any state, thus no permission was granted.

2. I've attached copies of invoices from USAC dated January 4, 2007. On the invoices, Buzz Telecom, Corporation owes USAC $2,869.55 due on February 2, 2007 and Business Options, Inc. owes USAC $2,262.40 due on February 2, 2007.

The invoices were attached to a letter from USAC stating, "The Commission has determined that the outstanding debt, including presently accrued interest, administrative costs, and penalties owed is $2,869.55" ($2,262.40 for Business Options, Inc.).

I am not through much of the paperwork that I had staff members handling before I had to terminate their employment. I can forward other USF data as it arises.

3. The last TRS contribution invoices I could locate were from August and September of 2005. The amounts were $2.27 and $2.28 respectively and both were paid.

4. To my knowledge, all TRS payments due at the date of the Consent Decree have been paid.

5. To my knowledge, the past due Universal Service charges as set forth in the Consent Decree totaling $772,659.56 has been completely satisfied.

6. The voluntary contribution of $510,000 has not been completely satisfied.

6a. May 15, 2004 through July 15th 2005 were paid. August 15, 2005 to present have not been paid.

6b. Per my records, $160,500 has been paid and $192,600 is past due.

6c. After the negotiations were concluded between BOS and the FCC, my attorney filed suit against BOS for non-payment. Although their initial quote to represent BOS was $25,000, which I had agreed to, the length of the representation including depositions in Indiana increased their fees substantially. BOS paid over a quarter of a million dollars to our attorneys, 10X the initial quote, but still had a ½ million dollar balance. Defending BOS again against one of the largest attorney firms in New York took time and money.

At the same time the FCC and then our attorneys were suing BOS, the Equal Employment Opportunity Commission, a different branch of the Federal Government, filed a sexual harassment suit against BOS stating a sales manager had harassed four telemarketers. The case lasted three years and went to a full jury trial. After two weeks of testimony, the jury returned from deliberation almost immediately voting unanimously in our favor. However, the cost to defend BOS against the EEOC and its enormous staff and resources, was over $500,000 and many, many hours of investigation, coordination and preparation.

Defending ourselves against the FCC, our attorneys, and the EEOC depleted our operating expenses and more than that, continually took attention away from expanding, or at least maintaining, the telecom customer billing base.

Our customer base shrunk from nearly 50,000 customers to less than 15,000 customers. There was no longer enough working capital to pay all obligations made. I know this is a long-winded answer, but it is what occurred and the reason we ended up short on working capitol and not paying the voluntary contribution.

7. BOS established an excellent code of conduct that conformed to the consent decree.

7a. Three copies of the Code of Conduct are attached as it was updated.

7b. The code itself has a place for the reader to sign as an attestation of their full understanding.

7c. Kurtis and Keanan Kintzel were responsible for developing and drafting the code of conduct. The Code of Conduct was presented to prospective employees for signatures at the time of hire, along with their employment contract. The Director of Personnel was the person responsible for ensuring that new and existing sales representatives had viewed and acknowledged by means of a signature the Code of Conduct.

All Sales Representatives were required to read, understand and sign this Code of Conduct prior to starting their job. To the best of my knowledge, this was done in every case.

7d. I have attached copies for three sales representatives reaffirmations. Each of the three representatives I chose to include worked at BOS from before the Consent Decree was signed so you can see that this Code of Conduct was renewed. After the EEOC suit concluded, we cleaned all personnel files of items that were not legally mandated and there was no agreement in the Consent Decree to keep copies of these reaffirmations so the latest reaffirmations, summer of 2006 and possibly winter of 2005, are attached. Our Regulatory Department was to do this action every six months.

8. BOS established written policies concerning the national "Do Not Call" list.

8a. Copies of the Policies and procedures are identified and attached. These policies were distributed to each employee that worked for BOS at the time they were created and then became part of the initial sales representative training for new hires.

8b. Customer names were put into a database and the submission slips were not retained. BOS stopped all marketing efforts to new customers in September of 2006. I do not know where or if the database is stored. To my knowledge, BOS has never had a legal complaint for calling someone on the Do Not Call list thus nor do I know of any regulation stating the database or list has to be retained if no new marketing is being done.

9. BOS previously sent to the FCC the recorded verifications on the nine complaints being requested. BOS no longer has an account with the verification company and has been prohibited by it from retrieving these verifications a second time.

9a. A copy of the verification contracts between BOS and The Verification Company and BOS and Voice Log are identified and attached.

9b. Verification scripts are attached.

9c. The fully executed contracts between BOS and the verification companies are the documents reflecting instructions to the verification companies. The contracts are attached.

9d. The verification scripts are attached and based upon applicable rules and regulations. In fact, one representative of Voice Log told me that our verification script is the longest he had ever seen. Additionally, the verification companies are two of the largest in the industry and describe themselves as experienced and expert in their knowledge and ability to perform their specific duties.

9e. The contracts between The Verification Company and Buzz Telecom and Voice Log and Buzz Telecom list addresses. Buzz Telecom Corporation is located in Merrillville,

Indiana and all its employed representatives work out of Merrillville, Indiana. In the spring of 2006, Buzz began utilizing Telecommunications on Demand, Inc. to assist in its marketing efforts. TOD utilized three call centers in the Orlando area of Florida, one in Las Vegas and one in Ohio. The Verification Company is located in the Tampa area of Florida and all of their verification representatives work out of their headquarters. Voice Log lists Maryland as their corporate headquarters in the contract. I've never been to the Voice Log offices and have no idea where their representatives are physically located, but attest that neither they nor any representative from The Verification Company is working out of my office.

10. There were no complaints attached to the letter I received by fax from Mr. Harkrader. All verifications for the past few years have been done by either The Verification Company or Voice Log as described in 9-9e above. The Verification Company did approximately 99% of the verifications for BOS.

11. A list of complaints received by BOS since May 1, 2006 is being compiled and will be forwarded. The verifications scripts and sales scripts are attached. Nearly all complaints originated from the independently contracted marketing firm. The penalty to the sales representatives in the contracted firm were 1) TOD, the company itself, was ordered to cease and desist from marketing for BOS and a bit later 2) the TOD contract with BOS was terminated.

As to the verification companies, their locations, etc. my response is the same as 9-9e above.

12.The sales script used is attached. I did not locate our oldest script, but did attach the verification script from the older sales script.

13. BOS purchased a lead base of all residential customers located in the United States. Billing Concepts supplied BOS with a database of numbers that they could not LEC bill. BOS added to this database numbers from the national, state, and company Do Not Cal lists. The leads base was scrubbed against the do not call database to provide a national list of residential customers that could be called. Approximately 300 leads per day per representative from this list were then printed and given to sales representatives to be called.

13a. If a telephone number was not on a Do Not Call list and could be LEC billed, it would be printed out for sales representatives to call. There were no other criteria to select persons to call.

13b. No target marketing has ever been done. We've never bought lists of selected groups, ages, organizations, etc. At one time, we did give senior citizens an additional 10% discount, similar to Denny's Restaurant or the movie theaters. We did not target seniors, but offered this discount if they stated that they were a senior citizen. To the detriment of the consumers, two states accused BOS of targeting seniors so we stopped giving seniors a 10% discount.

14. In the spring of 2006, BOS began using Telecommunications on Demand, Inc. ("TOD") to generate new customers for the Buzz Telecom network. TOD utilized five call centers, sub-agents of TOD. ***As I'm sure your records indicate, we have had virtually no FCC or state inquiries over the past four years and the increase of inquiries started when we began out sourcing our marketing of new customers.*** Also in the spring of 2006, we reduced our in-house sales staff by 80%.

14a. The contract between Buzz Telecom and TOD is attached.

14b. They were to use the same sales scripts as BOS. All customers generated by TOD were put through the same verification procedures as were established for BOS sales representatives, by the same verification companies and BOS paid for the verifications to be done.

15. Until October of 2006, BOS utilized LEC billing to bill nearly all of its customers and never had the ability to insert promotional materials into the LEC bills. Prior to October 2006, I recall doing only one bill inserts for a nutritional product to the small group of direct billed customers we did have. Since we did not get any responses, we ceased doing the promotion after a month or so. I do not have a copy of this particular promotion.

In October of 2006, we began direct billing our entire customer base. The following notices and promotions are attached: 1) October notice to customers that we were switching to direct bill from LEC bill, 2) holiday letter written by Keanan Kintzel sent in the November invoice to customers announcing we were lowering all of their intrastate rates from 13.9 cpm to 8.9 cpm, a 40% reduction in their rates, 3) $100 free long distance gift certificate for those that stayed with our firm for 12 months continuously and paid their bill on time each month. This was to go out in the November invoice, but the company that did our mailing forgot to insert the certificate. I believe the certificates were put on an auto responder for those customers that emailed us and would have been sent out with the December invoices had our customers not been disconnected.

Lastly and as an update to you, I have sent letters from Business Options, Inc. and Buzz Telecom, Corporation to each state's Secretary of State asking for them to cancel our right to transact business in their state and to each state's Public Utility Commission requesting our certificates to resell long distance service be cancelled. We're done.

Respectfully Submitted,

Kurtis Kintzel, President
Business Options, Inc.
Buzz Telecom, Corporation

EXHIBIT 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	EB Docket No. 03-85
	)	
BUSINESS OPTIONS, INC.	)	File No. EB-02-TC-151
	)	
Order to Show Cause and Notice of Opportunity for Hearing	)	NAL/Acct. No. 200332170002
	)	FRN: 0007179054
	)	

CONSENT ORDER

Issued: February 18, 2004 Released: February 20, 2004

This is a ruling on Joint Request for Adoption of Consent Decree and Termination of Proceeding, filed on February 17, 2004, by the Enforcement Bureau ("Bureau") and Business Options, Inc. ("BOI") in accordance with §§ 1.93 and 1.94 of the Commission's rules [47 C.F.R. §§ 1.93, 1.94].[1]

This proceeding was set for hearing by *Order to Show Cause and Notice of Opportunity for Hearing*, 18 F.C.C. Rcd 6881, released April 7, 2003 ("*OSC*"). Issues were specified to determine whether BOI had made misrepresentations or engaged in lack of candor (Issue a); to determine whether BOI had changed consumers' preferred carrier without their authorization in willful or repeated violation of § 258 of the Communications Act of 1934, as amended (the "Act") and §§ 64.1100-1190 of the Commission's rules (Issue b); to determine whether BOI had failed to file FCC Form 499-A in willful or repeated violation of § 64.1195 of the Commission's rules (Issue c); to determine whether BOI had discontinued service without Commission authorization in willful or repeated violation of § 214 of the Act and §§ 63.71 and 63.505 of the Commission's rules (Issue d); to determine whether BOI's authorization pursuant to § 214 of the Act to operate as a common carrier should be revoked (Issue e); and to determine whether the BOI and/or its principals should be ordered to cease and desist from the provision of any interstate common carrier services without the prior consent of the Commission (Issue f). *See OSC*, 18 F.C.C. Rcd at 6894 (¶ 36).

[1] The parties submitted a draft *Consent Order* to the Presiding Judge for consideration in accordance with § 1.94(b)(7). The *Consent Order* provides for termination of the proceeding after the period prescribed for a Commission review *sua sponte* has expired. *See* § 1.94(e) of the Commission's rules. There has been no change, addition, or modification of the *Consent Decree*.